In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-638

FINANCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION,
Petitioner,

vs.

BURLEIGH HOUSE, INC.,
Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT

This reply brief of the petitioner, in support of the petition for writ of certiorari, is filed pursuant to Rule 24(4) of this Court. We reincorporate herein the petition and appendix, and pursuant to Rule 24(4) address the reply brief to the arguments of the respondent "first raised" in the brief in opposition.

A. Appendix to Petition

R. Reference to pages to record on appeal lodged in Florida appellate court

T. References to pages of trial transcript contained in record on appeal

ARGUMENT

I. JUDGMENT WAS RENDERED BY HIGHEST COURT IN FLORIDA IN WHICH DECISION COULD BE HAD; PETITION TIMELY FILED IN THIS COURT (ARGUMENT I OF RESPONDENT WITHOUT MERIT).

II. PETITIONER AT ALL RELEVANT STAGES CHALLENGED CONSTITUTIONALITY OF INTERPRETATION OF FLORIDA STATUTES WHICH WOULD EXCLUDE IT FROM USURY EXEMPTION; ISSUE PROPERLY RAISED WHETHER FLORIDA COURTS SPECIFICALLY WROTE OPINIONS ON IT OR NOT (POINT II OF RESPONDENT WITHOUT MERIT).

III. GRAVE AND IMPORTANT CONSTITUTIONAL REASONS EXIST FOR GRANTING WRIT (POINT III OF RESPONDENT WITHOUT MERIT)

I. Judgment Was Rendered by Highest Court in Florida in Which Decision Could Be Had; Petition Timely Filed in This Court (Argument I of Respondent Without Merit).

The respondent seeks to prevent review of the grave and significant Constitutional issue, by challenging the procedural efficacy of the petition. The respondent urges that the petitioner cannot obtain certiorari review here because it did not exhaust its appellate remedy in the state courts; it urges that a direct appeal could have and should have been taken to the Florida Supreme Court—the state's highest court—from either the judgment of the trial court or the decision of the district court of appeal, and failure to prosecute such an appeal is procedurally fatal (28 U.S.C. §1257). We disagree for many reasons.

a. The Florida Constitution (Article 5, §3(b)(1)) provides in relevant part that the Florida Supreme Court "shall hear appeals . . . from orders of trial courts and decisions of district courts of appeal initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution."[1]

Here, review was sought by ordinary direct appeal from a final judgment to the Third District Court of Appeal of Florida (Fla. Const., Art. 5, §4(b)); then review from the decision of that court was sought in the Supreme Court of Florida, by petition for writ of certiorari under Fla. Const., Article 5, §3(b)(3),[2] on the ground that the district court of appeal decision was "in direct conflict with a decision of any district court of appeal or of the Supreme Court on the same question of law."

The Third District Court of Appeal entertained the appeal on the merits and rendered a decision on the merits (305 So.2d 59; A.-F, E). The respondent never objected—as appellee—to the jurisdiction of the Third District Court of Appeal, and indeed, now seeks to avail itself of the benefits of that affirmance.

The Florida Supreme Court initially *granted* the petition for a writ of certiorari (A.-D), then discharged it specifically because it found no direct conflict of Florida decisions (336 So.2d 1145; A.-C, B). The petition *was not* dismissed or denied for failure to invoke the appropriate remedy. The petition was entertained, and passed upon, on the direct conflict contentions.

b. Thus, we need not, most respectfully, embroil ourselves in the complex, highly developed, and frequently

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1. Repeated in Florida Appellate Rules, 2.1(a)(5).
2. See also, Fla.App. Rules, 2.2.

litigated issues of Florida law, on whether a direct appeal to the Florida Supreme Court would—or would not have—been appropriate, from either the trial court judgment, or the district court of appeal judgment—or whether either of those determinations was one "initially and directly" passing upon the "validity" of a state statute, within the highly developed and litigated meaning of the Florida Constitution; or was one "construing a provision of the state or federal constitution".

For example, there can be no question that the trial court and district court of appeal determinations *did not* "construe" any constitutional provisions within the meaning of Art. 5, §3(b) of the Florida Constitution, because they did not even *mention* any such provision, much less "explain, define or otherwise eliminate existing doubts arising from language or terms of a constitutional provision". *Ogle* v. *Pepin*, Fla.1973, 273 So.2d 391, 392-393. Thus no direct appeal to the Supreme Court of Florida ever was possible under that proviso.

Moreover, the trial court and district court of appeal did not actually discuss the validity of the statutes, but apparently interpreted them and held that they were "inapplicable" to Financial Federal (A.31-32; 21). A nice question was presented under Florida law as to whether either court passed "initially" and "directly" (expressly or inherently) upon the "validity" of a statute at all; see, *Snedeker* v. *Vernmar, Ltd.*, Fla.1963, 151 So.2d 439; *cf. Stein* v. *Darby*, Fla.1961, 134 So.2d 232; within the esoteric meaning and language of Art. 5, §3(b)(1).

c. All of this is irrelevant, because the procedural techniques for review in the Florida Courts, and up to and through the Florida Supreme Court, have passed muster in those courts, under the Florida Constitution.

i. The Third District Court of Appeal reviewed the initial appeal on the merits. No objection to its jurisdiction was made. If the trial court judgment "initially" and "directly" passed upon the validity of a state statute within the meaning of Article 5, §3(b)(1) of the Fla. Const., "*exclusive*" jurisdiction over the appeal would have vested in the Florida Supreme Court—and *not* in the Third District; *Couse* v. *Canal Authority*, Fla.1968, 209 So.2d 865, 866; *Robinson* v. *State*, Fla.1961, 132 So.2d 3.

ii. If the trial court judgment "initially" and "directly" passed on the validity of the statutes, the decision of the Third District Court of Appeal would have been a *nullity; Robinson* v. *State*, Fla.1961, 132 So.2d 3. Only the Florida Supreme Court would have had Florida Constitutional authority to review the judgment. Yet the Third District indeed reviewed the judgment; and the Florida Supreme Court did not vacate the decision of the Third District, but treated it as efficacious in every way; and granted and then discharged a writ, thereby approving legality of the Third District decision at the very least, and the jurisdiction of the Third District to render it.

iii. If the trial court decision passed "initially" and "directly" on the validity of the statutes, the Third District Court of Appeal of necessity would have—under Florida law—simply transferred the case to the Florida Supreme Court for full review on the merits; the only thing it would be empowered to do under Florida law. But *in no* event could it have passed on the merits, or dismissed the appeal. In Florida, an appeal to the wrong Court results simply in transfer to the correct one (Fla. Const., Art. 5, §2(a)); and see, *State ex rel. Soodhalter* v. *Baker*, Fla.1971, 248 So.2d 469; Fla.App. Rule 2.1(a)(5)(d).

iv. The nature of the holdings of the trial court (A.31-32) and district court of appeal (A.21) were similar if

not exact. So if there were no basis for direct appeal to the Supreme Court from the trial court, there was no basis for direct appeal from the Third District. Both types of direct appeal to the Florida Supreme Court—from either lower court—would require the same showing (Article 5, §3(b)(1), Fla. Const.)

v. Nor can the respondent claim that an improper remedy or vehicle (certiorari) for Florida Supreme Court review of the district court of appeal decision was attempted unsuccessfully; and that a full direct appeal could have been had in the Florida Supreme Court, but was not. If appellate jurisdiction [as opposed to certiorari jurisdiction] existed in the Florida Supreme Court, then Florida Supreme Court would have been bound by the Florida Constitution to treat the petition for a writ of certiorari as an appeal, under Article 5, §2(a) of the new Florida Constitution (1968), in effect at all stages of the relevant proceedings here. That provision shows that no "proceeding" in the Supreme Court or District Courts of Appeal may be dismissed "because an improper remedy has been sought."

Unlike the old law cited by respondent (pg. 8, *Bartow Growers Proc. Corp.* v. *Fla. Gr. Proc. Corp.*, Fla.1954, 71 So.2d 165), a petition for a writ of certiorari now is indeed to be treated as a notice of appeal where appeal is the appropriate remedy for review; *State* v. *Johnson*, Fla.1974, 306 So.2d 102; *Whitlow* v. *State*, Fla.1975, 313 So.2d 748; *City of Miami* v. *Southeast First Nat. Bk. of Miami*, Fla. App.3rd D.C.A. 1975, 320 So.2d 836, 837.

vi. The Florida Supreme Court was here aware of the lower court determinations, the points raised, and the nature of our constitutional argument (A.32-38). Nevertheless the Court entertained a petition for certiorari addressed to the district court decision and granted it

(A.13-14) only to discharge it because, after initially perceiving a direct conflict with prior Florida decisions (A.13-14), it then found *no* direct conflict. It never suggested full appeal jurisdiction.

There was no vacatur of the district court decision on grounds that a direct appeal from the trial court was the exclusive remedy; no finding that a direct appeal would be from either of the lower court decisions; and no treatment of the proceedings as a full appeal. Moreover, the Supreme Court of Florida found no conflict with 14th Amendment cases, in any event (see claims of conflict in Fla. Sup. Ct., footnotes, A.36-38; A.4, 7), so under Florida law, the appropriate efforts for review of the constitutional claim were exhausted in the highest court of the state and were found wanting, although erroneously from a federal constitutional viewpoint.[3]

vii. In any event, a review was sought, in the Florida Supreme Court, of the Constitutional issue and was denied. No matter what was selected by the petitioner out of possible remedies available, the Supreme Court of Florida rejected the Constitutional claim in denying jurisdiction. Had appeal been available—the Florida Supreme Court—

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3. Perhaps a certiorari petition and a full appeal, in certain instances, properly could invoke the jurisdiction of the Florida Supreme Court in the same case: *Tyson* v. *Lanier*, Fla.1963, 156 So.2d 833; 156 So.2d 841. Then, the Florida Supreme Court would dispose of the case under one or the other of the procedures on the merits. Here, review was sought by cert., which was denied.

This method of review sought to bring before the Florida Supreme Court issues on statute of limitations, usury, statutory interpretation; intent; and spreading of interest over a long term financing agreement. We did not seek to invite review of only a constitutional issue. And we did exhaust our state remedies by an alternative procedural method—the correct one.

If a direct appeal were appropriate, the Florida Supreme Court would have treated the matter as an appeal and reviewed on the merits (Art. 5, §2, Fla. Const.; *State* v. *Johnson*, supra; *Whitlow* v. *State*, supra) the Constitutional issue, under present law, and any other issues it believed meritorious.

aware of its jurisdiction, would have treated the proceeding as an appeal. It disposed of the case on certiorari (compare, *Tyson*, supra), finding no jurisdiction [and thus no appeal allowable, nor even necessary to determine the case]. We properly selected a remedy, and sought review in the state's highest court. However the procedure is viewed, state remedies were exhausted.

We timely filed our petition in this court, addressed to the District Court of Appeal decision, after discharge of the Florida Supreme Court writ of certiorari. No Florida procedural ground precludes the grant of a petition here. See, *Randall* v. *Bd. of Commissioners*, 261 U.S. 252, 43 S.Ct. 252 (1923); *Amer. Express Co.* v. *Levee*, 263 U.S. 19, 44 S.Ct. 11 (1923).

II. Petitioner at All Relevant Stages Challenged Constitutionality of Interpretation of Florida Statutes Which Were Excluded From Usury Exemptions; Issue Properly Raised Whether Florida Courts Specifically Wrote Opinions on It or Not (Point II of Respondent Without Merit).

It is not material in this Court whether or not the trial court or district court of appeal "directly" and "initially" passed upon the validity of the state exemption statutes, within the meaning of the Florida Constitution, so as to allow a direct appeal to the Florida Supreme Court. As we have seen, the Florida courts and particularly the Florida Supreme Court determine their own jurisdiction; and on the procedural history of the case, it is clear that state appellate remedies were exhausted. This does not mean, however, that petitioner did not raise the constitutional issue at all appropriate times in the Florida courts, or that it did not raise the constitutional issue sufficiently to furnish a predicate for a petition for

writ of certiorari in this court. Indeed, whether the petitioner sufficiently raised a constitutional issue, concerning constitutional validity of a statute in the trial court or state courts, is uniquely a federal question, for this court to determine. And the sufficiency of the invocation of a constitutional question, or the preservation of a constitutional question, under the Federal Constitution, requires no magic words. The claim of unconstitutionality in a state statute or application of a statute may be raised in the trial court—or in the state appellate courts—by any words and methods which suffice to call the contention to the attention of those courts. A clear intendment to raise the issue is sufficient: *Street* v. *New York*, 394 U.S. 576, 89 S.Ct. 1354 (1969); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61, 63 (1928). Viewed in this light, there can be no question that the constitutional contention was raised at all appropriate stages in the state courts, including the appellate court.

a. The petitioner urged in the Florida trial court that an interpretation which exempted only domestics and not federals would be unconstitutional under the 14th Amendment (A.43-44). The trial court held that Financial Federal was not exempted from the usury acts (A.32).

b. Federal appealed to the Third District Court of Appeal challenging that ruling (A.41-42).[4]

c. At page 7 of both its main brief and reply brief in the Third District Court of Appeal, the appellant (petitioner here) urged that the trial court's interpretation of

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4. Florida Appellate Rule 3.5(c) requires only an assignment of error which identifies the judicial act complained of. Reasons are not required. The petitioner, on appeal to the Third District Court of Appeal, claimed error in the judicial act or ruling finding non-exemption of Financial Federal (A.41-42). This was sufficient to furnish a predicate for arguing constitutionality of course.

the exemption statutes, or those interpretations for which the appellee (respondent) contended, were "constitutionally suspect" and "would surely have violated the Florida and the Federal Constitutions" (A.40-41).

d. The Third District Court of Appeal held that the Florida exemption statutes applied only to domestic associations and not to foreign associations such as the defendant Financial Federal (A.21).

e. As shown in the petition (pg. 12), on rehearing, Financial Federal pointed to the serious and substantial constitutional issue which the Third District Court of Appeal had overlooked (A.39). The petition for rehearing was denied by the Third District Court of Appeal (A.15).

f. On petition for a writ of certiorari, the petitioner here raised among other things, a contention of direct conflict between the decision of the Third District Court of Appeal and prior Florida decisions under the 14th Amendment (A.37-38). In the brief on jurisdiction, the very same contention was made; a conflict was asserted showing prior Florida decisions construing the 14th Amendment (see footnote, A.36-37).

g. The Florida Supreme Court initially granted the writ of certiorari (A.13). And the petitioner filed a brief on the merits, urging that the Third District Court of Appeal interpretation of the Florida statutes was unconstitutional under the 14th Amendment and the Supremacy Clause.[5] On the merits, both Florida Supreme Court deci-

5. The petitioner, on the merits, was no longer restricted to showing a conflict with prior Florida decisions. So, the Supremacy Clause violations, as well as the 14th Amendment violation, now was asserted—in the Florida effort to regulate a Federal institution in an arbitrary manner, to the benefit of competing state institutions. The Third District held that state institutions were exempted, but not federals.

sions and United States Supreme Court decisions were cited (A.33-36). After oral argument on the merits, the Supreme Court of Florida discharged the writ, finding no jurisdiction, because, it held the decision on statutory construction in the Third District did not conflict with prior decisions in Florida. A Florida Supreme Court dissenting opinion (in the four to three decision) challenged the discriminatory interpretation of the usury exemption statutes (A.3-12), under the Supremacy Clause, citing cases.

The Financial Federal Savings and Loan Association again filed a petition for rehearing and again urged and flatly contended that the unequal treatment afforded to this federal institution, having virtually the "identical powers" as domestic savings and loan associations rendered the statutes—as construed—unconstitutional, under both the 14th Amendment and the Supremacy Clause (Article 6); insofar as it attempted to exclude federal savings and loan associations (A.33). The petition for rehearing was denied (A.2).

Thus, the Financial Federal Savings and Loan Association initially attempted to demonstrate that the usury exemption statutes of Florida clearly applied to federal savings and loan associations as well as domestic ones, under their clear wording, and under the edict that statutes should be construed to avoid constitutional problems where possible. However, the trial court found that Financial Federal Savings & Loan Association was not exempted; and the Third District Court of Appeal found that the usury exemption statutes applied only to domestic associations and not foreign ones like Financial Federal. Financial Federal challenged any discriminatory interpretation of the statutes at all relevant points. The point was preserved.

Most assuredly then, the constitutional issue sufficiently was preserved in the trial court; and in the Third District Court of Appeal; and in the Florida Supreme Court. The intendment was clear, *Street* v. *New York*, supra, 394 U.S. 576; *New York ex rel. Bryant* v. *Zimmerman*, supra, 278 U.S. 63, 67. The matter was argued appropriately in the briefs in the Third District Court of Appeal under appropriate assignments of error; *cf. Herndon* v. *Georgia*, 295 U.S. 441, 55 S.Ct. 794. The constitutional issue may not be avoided by a contention that it was not appropriately preserved in the Florida courts, even though discussion of the constitutional issue, for some reason, was not contained in the decisions.

III. Grave and Important Constitutional Reasons Exist for Granting Writ (Point III of Respondent Without Merit).

The petitioner has addressed its petition to the decision of the Third District Court of Appeal of Florida—the highest state court which rendered and could have rendered a decision here. That decision held that the exemption statutes exempted domestic building and loan associations from the usury laws; but not federal savings and loan associations. We have shown in our petition that there is no substantial difference between domestic building and loan associations and federal savings and loan associations, nor do the statutes even contemplate any differences nor suggest any differences; and indeed the exemption provisions are applicable to both (F.S.665.161; 665.01; 665.40; 687.031; 665.18 (1967); see petition, pgs. 6-8). The petition shows the similarities between the two types of associations with particularity (pgs. 22-24). There is no difference between the two types which would justify legislation favoring domestic building and loan associations at the expense of federal savings and loan associations.

The differences between the two in 1967 and now, have no relation to a legitimate reason for exempting domestics, to the detriment of federals. The equal protection mandate of the Federal constitution forbids the construction of the Florida courts below. So does the supremacy clause. Under the Florida statutes recited, clearly federal savings and loan associations like Financial Federal must be exempted from the usury laws to the same extent as are domestics. Any other interpretation under the statute is unconstitutional for unfair and unequal discrimination (United States Constitution, Amendment 14; *Morey* v. *Doud*, 354 U.S. 457 (1957); no "rational basis" for discrimination, even if strict scrutiny not required). Residency—without more—or place of incorporation or charter of entities with virtually identical powers is not a legitimate basis for a discriminatory classification in statutes like these; *Power Mfg. Co.* v. *Saunders*, 274 U.S. 490 (1927). Certainly a desire to favor a state association over a federal one does not suffice; see, for example, *Morey* v. *Doud*, 354 U.S. 457 (1957); *Dukes* v. *City of New Orleans*, 5 Cir. 1974, 501 F.2d 706.

A federal savings and loan association, of course, is a "building and loan association" under F.S.665.01. The terms are synonymous (see 12 U.S.C. 1424a; and 1724a-1730). Such associations are regulated by the federal home loan bank board pursuant to federal statute commonly known as Home Owners Loan Act of 1933 ("H.O.L.A." as amended; 12 U.S.C. 1437b; 1464a).

An effort by the Florida Legislature to favor a domestic association to the detriment of a federal one, by exempting domestics from usury laws, but not federals, and thus to regulate the federal institution in such a discriminatory manner, is unconstitutional (Amendment 14; and Article 6; U. S. Const., supremacy clause). A state

may not discriminate by legislation against a federal institution, or against an entity operating under federal auspices or license in such a manner. See, *Michigan National Bank* v. *Michigan*, 365 U.S. 467, 81 S.Ct. 659 (1961); *United States* v. *Massachusetts Tax Commission*, 481 F.2d 963 (1 Cir. 1973); *Dukes* v. *City of New Orleans*, supra; *Moses Lake Homes, Inc.* v. *Grant County*, 365 U.S. 744, 751 (1961); *Phillips Chem. Co.* v. *Dumas Indep. School Dist.*, 361 U.S. 376 (1960); *Perez* v. *Campbell*, 402 U.S. 637, 648, 650 (1971).

A state cannot by legislation create a dual standard under which a loan made by a federal association is treated differently from the same loan made by a substantially identical state chartered institution, to the detriment of the federal institution on the sole rationale that they have been chartered by different authorities. See, *U. S.* v. *State Tax Commission*, 1 Cir. 1973, 481 F.2d 963, 967-970; *Michigan National Bank* v. *Michigan*, supra.

The respondent's argument below was that domestic associations were entitled to special treatment because they could only make loans to members. The "loans to members only" requirement appears to have been eliminated long prior to the time the instant case arose (see, F.S.665.21 (5) (1967)); and the argument is inaccurate and has nothing to do with the unreasonable classification here anyhow. Both institutions presently are treated the same (F.S.665.-511), which illustrates further lack of recognition of any rational basis for classification.

Where a state statute clearly attempts to encompass and protect a certain class, it may not constitutionally exclude, or be interpreted to exclude, persons or entities, who fall within the clear ambit of the statute, for some artificial, discriminatory and arbitrary reason. Such persons or entities must be deemed to fall within the ambit of the statute. *Levy* v. *Louisiana*, 391 U.S. 68 (1968); *Glona* v. *American Guaranty and Liability Ins. Co.*, 391 U.S. 73 (1968); *Weber* v. *Aetna Gas Co.*, 406 U.S. 164 (1974). Here, Financial Federal of necessity falls within the ambit of the statute exempting savings and loan associations from the Florida usury laws.

Of course, under Florida's new statutory scheme, as we have seen, effective June 2, 1969, federal savings and loan associations clearly are exempt.[6]

The unconstitutionality of the statutes as interpreted by the Third District Court of Appeal to exclude federals, and the merits, walk hand in hand here. For the decision of the Third District Court of Appeals is wrong for many reasons. Had the parties been able to carry out their original concept of 360 long-term loans, this case would never have arisen. The mere fact that a rollover had to be used so a valid mortgage would exist during construction should not entitle plaintiff (respondent) to free financing of its whole project; nor should procedural business difficulties in which the parties became embroiled even imply that the resolution was concocted by the Federal as part of a corrupt scheme or device to evade the usury laws from which local savings and loan associations are exempted, to the detriment, as the Florida courts apparently have held, of highly competitive, similarly situated federal institutions.

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6. As we have shown in our petition, under Florida's new statutory scheme, effective June 2, 1969, federal savings and loan associations clearly are exempt, together with domestics. However, the decision here is vitally important from a constitutional point of view, because if permitted to stand, it will serve as a precedent which enables federal savings and loan associations with substantially the same powers as domestic building or savings and loan associations to be discriminated against, in a highly competitive business, to the benefit of domestics and to the detriment of federals.

Most respectfully there is no way that the judgment and decision of the Third District Court of Appeal should be permitted to stand; in the light of the clear-cut Florida statutes exempting savings and loan associations—which constitutionally must include federal savings and loan associations, where, as here, they have been held to exclude domestics.

It is impossible to tell just how and why the Third District Court of Appeal ruled as it did in the light of the constitutional argument. But an affirmance could not constitutionally have resulted in the light of the constitutional challenge made; and the matter indeed was preserved. Accordingly, this Court may and should, most respectfully, grant the petition; see *Street* v. *U. S.*, supra, 394 U.S. 576, 89 S.Ct. 1354.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision and judgment of the Third District Court of Appeal of Florida should be quashed and reversed with directions to the trial court to enter judgment for the petitioner. Certainly, most respectfully, this court should review the matter. The Third District Court of Appeal has passed upon, or impermissibly ignored, an issue of U. S. constitutional law and has construed a statute in direct contravention of the Fourteenth Amendment and Article 6. Accordingly, under Rule 19a of the Rules of this Court, certiorari review is indicated because the Third District Court of Appeal of Florida has most assuredly decided the case in a way that is not in probable accord

with decisions of this Court. Review is warranted in this important area of constitutional law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three true copies of the foregoing Reply Brief of Petitioner have been mailed this ..... day of December, 1976 to: LAPIDUS & HOLLANDER, Attorneys for Respondent, Suite 2222, First Federal Building, One S.E. Third Avenue, Miami, Florida 33131, in accordance with Rule 33 of this Court.

By ROBERT ORSECK